

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals, District of Columbia

OCTOBER TERM, 1902.

No. 1232

172

No. 9, SPECIAL CALENDAR.

HENRY C. PAYNE, POSTMASTER GENERAL, APPELLANT,

vs.

THE UNITED STATES *EX RELATIONE* THE RAILWAY
LIST COMPANY, A CORPORATION.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JUNE 30, 1902.

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Thoms A. J.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

HENRY C. PAYNE, Postmaster General, Appellant,
vs.
THE UNITED STATES *ex Relatione* THE RAILWAY LIST
Company, a Corporation. } No. 1232.

a Supreme Court of the District of Columbia.

THE UNITED STATES *ex Relatione* THE RAIL-
way List Company, a Corporation, Relator,
vs.
HENRY C. PAYNE, Postmaster General, Re-
spondent. } No. 45264. At Law.

UNITED STATES OF AMERICA, } ss :
District of Columbia,

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit :

1 *Petition for Mandamus.*

Filed Mar. 3, 1902.

In the Supreme Court of the District of Columbia.

THE UNITED STATES *ex Relatione* THE RAIL-
way List Company, a Corporation, Plaintiff,
vs.
HENRY C. PAYNE, Postmaster General, De-
fendant. } At Law. No. 45264.

Petition for writ of mandamus.

To the supreme court of the District of Columbia :

The petitioner, The Railway List Company, a corporation, respectfully states as follows :

1. That the petitioner is a corporation duly organized and doing business under the laws of the State of Illinois, and it has a place of business at No. 315 Dearborn street in the city of Chicago in said State, and has always, since its incorporation, had and maintained a known place of business in said city.

2. That it is and has been since on or about the first of January,

1898, the owner and publisher of a periodical publication known as "The Monthly Official Railway List;" that said publication is devoted to and published in the interest of the railway industry of the United States and other allied industries.

3. That said publication is issued regularly on or about the 15th day of each month in the year, and each issue bears date the month and year of the issue, and it is numbered consecutively; that it is issued from the said office of the petitioner, and that it is formed of printed paper sheets, without board, cloth, leather or other substantial binding such as distinguish printed books for preservation from periodical publications that it is not and does not have the characteristics of a book; that it originated and is published for the dissemination of information of a public character, that is to say information concerning railroads, railroad companies, private car companies, fast freight lines, express and telegraph companies, giving an official list of their officers, mileage operated, number of locomotives, freight and passenger cars in service at the date of each publication, and the current railway news; that each issue of said publication gives full and accurate information as to changes in the officials of said companies, changes in equipment and in the construction and increase of mileage of railroads operated in the United States, all of which information is news of vital interest and importance to those engaged in the management and operation of railroads, transportation companies, banks, financial, commercial and manufacturing institutions in the United States, and that said information is desired, by those so engaged, at regular intervals not exceeding one month between issues; that said publication is issued as aforesaid to a legitimate list of subscribers, each of whom pays a regular yearly subscription price of two dollars per annum for said periodical publication.

4. That prior to the year 1898 said publication was published and issued by your petitioner annually; that as an annual publication it did not meet the requirements of those engaged in the industries aforesaid in that the information aforesaid was required at regular and shorter periods in order that said information might be used to advantage in carrying on the industries aforesaid; that to meet said demand your petitioner undertook to establish, publish and issue said publication as a monthly periodical; that in order to gather such information in an official and reliable form at monthly intervals and publish the same at said stated periods involved your petitioner in the investment of very much more money capital and the employment of a larger number of employees; that to successfully inaugurate and carry on said enterprise required the most careful consideration of cost and expense in the publishing of said publication and in the distribution of the same to its subscribers.

5. That your petitioner secured a legitimate list of subscribers for said monthly periodical and prepared the first issue of said publication on or before February 5th A. D. 1898, and submitted the same, with a truthful statement of all said facts, to the Post-office

Department of the United States, then under the direction, control and supervision of the Honorable James A. Gary, Postmaster General, and asked that said monthly publication be admitted to the mails of the United States and be transported and delivered to subscribers as second-class mail matter at pound rates, for which there was then and has since then been charged the rate of one cent per pound or fraction thereof; that said executive department, under the general direction of the said Postmaster General, did duly and carefully consider said publication and all of the facts concerning it and its right to be received, transported and delivered as second-class mail matter aforesaid under the statutes of the United States and the proper regulations of the Post-office Department then in force; that after said due consideration of all the facts of the case and of the publication itself, and the list of legitimate subscribers, said executive department rendered a decision in said case and held that said periodical, in connection with the facts aforesaid, was, under the laws of the United States, entitled to be received, transported and delivered by the United States mail service as second-class matter at the pound rate, and all postmasters and agents in said mail service were directed and ordered to receive said publication and to transport and deliver the same as second-class mail matter aforesaid, and as evidence and record of said decision and determination by said executive department there was issued on February 5, 1898, to your petitioner, in pursuance of the practice and regulations of said department, a certificate, which said certificate is in words and figures following, to wit:

(3505.)

Certificate of Entry of Publication as Second-class Matter.

POST-OFFICE AT CHICAGO, ILL., *February 5'', 1898.*

I hereby certify that the Monthly Official R'y List a monthly published at this place, has been determined by the Third Assistant Postmaster General to be a publication entitled to admission into the mails at the pound rate of postage, and entry of it as such is accordingly made upon the books of this office. Valid while the character of the publication remains unchanged.

CHARLES U. GORDON, *Postmaster.*
J. A. M.

That from and since the 5th day of February, 1898, during and until the unlawful acts and doings of said executive department hereinafter complained of, said publication was received, transported and delivered by the United States mail service as second-class matter aforesaid, in pursuance of said decision so rendered as aforesaid; and your petitioner, relying in good faith upon said certificate and the terms thereof, did thereafter invest and put into said business more than ten thousand dollars in establishing said monthly periodical.

6. That on or about the 4th day of October, 1901, the said executive department, then under the direction, control and supervision of the Honorable Charles Emory Smith, Postmaster General, notified your petitioner that it would be given until October 18th in which to present at the Chicago post-office or to the department at Washington, D. C. written evidence that said publication should not be excluded from the said second-class rates of postage upon the sole ground "that it has the characteristics of a book;" that under date of October 8, 1901, your petitioner, by Willard A. Smith, its chairman, forwarded a written communication to the honorable Postmaster General last named, stating some of the facts and referring to the certificate aforesaid, and your petitioner's rights thereunder, and concluding the statement as follows: "And we respectfully ask that, in case any doubt remains as to our proper rights in the matter, that we again have the privilege of presenting our case
5 either in writing or in person." That without further notice or warning, and as the petitioner was mailing its November issue, a communication was received by the petitioner in words and figures following, to wit:

First Notice.

Post-office, Chicago, Illinois, window 9, mailing division.

11, 18, 190-.

Official Railway List.

SIR: We are holding 125 piece- of 3d-class matter which cannot be dispatched because 4c. due each.

This matter will be returned to you without charge if you send for it at once. If not called for before 5 days it will be disposed of as the regulations require.

This notice must be presented at window 9 in order to secure the matter.

F. E. COYNE, *Postmaster.*
B.

C. P. O. 1071-6-15-1901-5m.

On the same day the petitioner also received the following communication in words and figures following, to wit:

General post-office, finance division, Chicago, Illinois.

Office of second-class matter, room 8.

NOVEMBER 18, 1901.

Publisher "Monthly Official Railway List," 315 Dearborn St., Chicago, Ill.

DEAR SIR: Under date of November 16th we are directed by the Post-office Department to cancel the certificate of entry of "The Monthly Official Railway List" as second-class matter, and to advise you that hereafter it will be unlawful for you to print on that publication a statement of its entry as second class.

When offered for mailing in the future, whether by publisher, news agent or others, it will be subject to postage at the third-class rate, namely, one cent for each two ounces or fraction thereof, prepaid by stamps affixed to each copy.

Yours respectfully,

W. B. GETTY,
Supt. Second-class Matter.

That upon receipt of said notices petitioner, by its legal counsel in the city of Washington, called at the executive office of the Postmaster General and was referred to the Third Assistant Postmaster General having charge of the matter in controversy, and there requested a rehearing and the opportunity to present a legal argument in support of your petitioner's rights in the premises, and that the November issue of said publication be received and forwarded. That thereupon the Third Assistant Postmaster General directed the postmaster at Chicago to receive and forward said November issue, and directed that the order of exclusion be applied to the December issue and subsequent numbers of said publication. That after several interviews between the legal counsel of your petitioner and said Third Assistant Postmaster General, the said Third Assistant Postmaster General refused to recognize the legal rights of your petitioner and insisted upon the cancellation of said certificate, and refused to admit longer said publication to the United States mails as second-class matter aforesaid.

7. That thereupon, on the 12th day of December, 1901, your petitioner appealed from the decision of said Third Assistant to the Postmaster General; that pending said appeal and before the same was taken up for hearing, the Honorable Charles Emory Smith resigned his position as Postmaster General and the Honorable Henry C. Payne was duly appointed and installed as Postmaster General; that on or about the 22nd day of January, 1902, the legal counsel of petitioner called upon the said Postmaster General last named and submitted a written request that the legal questions involved in the appeal be referred to the law department for hearing and advice; that at the time of submitting the said written communication, said legal counsel stated to the said Postmaster General that in the event said reference was made, that he desired to present to the law department the points and authorities upon which petitioner relied in support of its contention, and that in the event said reference was not granted, that the appeal to the Postmaster General be set down for some day convenient to the said Postmaster General, for argument, to the end that in the exercise of his judicial functions said Postmaster General might have before him the facts of the case and the law applicable thereto; that thereafter, without date, the legal counsel of petitioner received from said Postmaster General a communication in writing, which is in words and figures following, to wit:

OFFICE OF THE POSTMASTER GENERAL,
WASHINGTON, D. C.

Messrs. Needham & Needham, attorneys & counsellors, Bond bldg.,
Washington, D. C.

GENTLEMEN: Referring to your letter of the 22nd instant, and making acknowledgment of the receipt thereof, I desire to state that I will further consider your proposition to refer the case of the publishers of "The Official Monthly Railway List" to the assistant attorney general for this department or to the Department of Justice when you have had the opportunity to reply to this communication.

I make the inquiry as to whether, or not, it would not be, in your opinion, advisable to present the case in a little more elaborate form, setting out briefly some of the facts connected therewith upon which you rely to sustain your application for appeal? I do not mean by this to suggest that you should file an elaborate brief, which might be done afterwards, as well as to present an oral argument to the law officer to whom the case will be sent; but simply that you make the matter a little clearer by a fuller reference to the facts upon which you rely as constituting in your judgment sufficient ground upon which application for appeal may be justified.

On receipt of your reply hereto I will answer you promptly as to whether the appeal will be granted, and will name the officer to whom it will be sent.

Very respectfully,

H. C. PAYNE,
Postmaster General.

File, A. A. G., No. 5749.

That shortly after the receipt of said letter, said legal counsel replied thereto in the words and figures following, to wit:

FEBRUARY 1, 1902.

The honorable the Postmaster General, Washington, D. C.

SIR: Replying to your communication, No. 5749 (not dated), in the matter of "The Official Monthly Railway List," suggesting the advisability of our stating more fully the facts and propositions of law upon which we desire a reference to the law department, we would say:

1. Statement of facts.—Prior to 1898 "The Official Railway List" was published as an annual. As such it did not meet the growing demands of the railway industry for information regarding the changes in the official list of each railroad company and the increase in mileage and railway equipment. To meet this demand the Official Railway List Company proposed to issue a monthly publication. In February, 1898, the publication was submitted to the Post-office Department, then under the charge of the Honorable James A. Gary, Postmaster General. After a hearing of the facts and an examination of the publication, a certificate was issued admitting it to the mails as second-class matter. The form of this certificate is important, and is in full as follows:

"Certificate of Entry of Publication as Second-class Matter."

POST-OFFICE AT CHICAGO, ILL., *Febr'y 5'*, 1898.

I hereby certify that the Monthly Official R'y List, a monthly published at this place, has been determined by the Third Assistant Postmaster General to be a publication entitled to admission into the mails at the pound rate of postage, and entry of it as such is accordingly made upon the books of this office. Valid while the character of the publication remains unchanged.

(Signed)

CHARLES U. GORDON, *Postmaster.*
J. A. M."

Thereupon the company purchased an additional plant and employed a corps of assistants, all of which involved the investment of over ten thousand dollars, and since that time, until the order appealed from was entered, the publication has been admitted as second-class matter, and the company has increased its yearly subscription list, and has now outstanding contracts for subscriptions and advertising extending over a period of twelve months or more.

The law under which this adjudication took place was as follows:

(a.) The general statute passed by Congress March 3, 1879, and the amendatory acts. This act provided for the admission to the mails as second-class matter, among other publications, of those devoted to "some special industry." Under the statute, the duty devolved upon the department to determine in each case what constituted second-class matter; such decision was a judicial act and was evidenced by a certificate of entry.

(b.) By the Postal Regulations of 1893, section 284, it is provided that a certificate of entry may be revoked upon two grounds: first, where it appears that it was issued upon "false evidence;" and second, where the character of the publication has been changed since its admission as second-class matter.

Under a decision of the Supreme Court of the United States, a "regulation" not inconsistent with the statute "has the force of a law," and therefore when property rights are to be determined or affected, the statute and the regulation must be considered together.

This was the state of the law at the time the above certificate was issued to "The Monthly Official Railway List;" and at that time there were no other grounds upon which the certificate could be cancelled by the department, than those stated in the regulation above quoted.

(c.) In the appropriation bill of March 3, 1901, Congress declared that "when any publication has been granted second-class mail privileges the same shall not be suspended or annulled, until a hearing shall have been granted to the parties interested." The effect of this will be discussed later.

October 4, 1901, the appellant was given notice to present to the department an argument why the above certificate of entry should not be cancelled upon the ground "that it has the characteristics of a book." On November 18, 1901, this department undertook to

cancel the certificate of entry above quoted, for the reason, as stated by the Third Assistant Postmaster General, that it was a reference book.

It will be observed that it is not claimed by the department that there was any fraud in securing the certificate of entry, nor is it claimed that there has been any change in the character of the publication since its entry. The ruling, from which appeal is taken, is a review of the judicial act of the former Postmaster General who issued the certificate of entry.

2. Questions of law.—The questions of law which we desire to have referred to the law department for argument and consideration primarily are:

First. Is it competent for one Postmaster General to review and undo the work of his predecessor in matters of this character? In other words, should the principle of *res judicata* apply to executive action where property rights are involved?

Second. Did the legislative act of 1901 enlarge the powers of the Postmaster General so as to permit a review and revocation
9 of a certificate for other reasons than those then stated in the regulations of the Post-office Department?

Upon the first question we are prepared to submit decisions of the Supreme Court of the United States and other Federal courts, to the effect that where property rights have been acquired under an existing law and a decision by one Postmaster General or executive officer that a succeeding administration has no right to review that decision and change it so as to impair property rights acquired under it. We are also prepared to submit many opinions of Attorneys General in which this doctrine is recognized. In one opinion the Attorney General says:

"I had supposed the rule to be, that, whatever purely executive measure had been adjudged, and decided, and closed, during a preceding administration was considered as withdrawn altogether from the action of the succeeding President; and the rule seems to result naturally and necessarily from the nature of things."

Again it is stated: "A subject once disposed of by the proper executive department, except under peculiarly strong circumstances, ought to be regarded as settled."

And again: "A practice (of the department) illegal in itself, may have become so firmly rooted, as to require to be acquiesced in continually from considerations of administrative justice of expediency; but these considerations do not warrant the extension of the rule to new cases or modification not comprehended in the original misconstruction."

Many other citations might be given, but these are sufficient to show the position which we take. Courts of justice sometimes overrule former decisions in new cases, but it has never been thought for a moment that this justified the court in reopening the cases overruled, and thereby injuring or destroying property rights acquired under them. In this case there was a judicial determination by the administration of Postmaster General Gary, that this publication was

second-class matter. The certificate was issued, reserving only the right to change that decision in the event that the character of the publication was changed. The general doctrine of equity applicable in all cases, also reserved the right to cancel it in case it had been obtained by fraud. Subject to these two contingencies the receiver of the certificate had the right to invest capital and acquire property rights under that decision, and no subsequent administration has the right, without legislative authority, to review that decision or in any way impair those rights.

Second. Did the legislative act of 1901 give to the Postmaster General power to review these former decisions upon any other grounds than the two stated, viz: that there had been fraud in obtaining the certificate or that the characteristics of the publication had changed? A careful reading of the act itself shows that it was intended simply to provide for hearings in cases where, under the law then existing, the Postmaster General had the right to review cases and annul certificates. It does not, by express language or by implication, undertake to change the existing law or practice or enlarge the powers of the Postmaster General, but simply provides for a procedure where action was then permitted under the existing law.

Third. We also desire to submit authorities bearing upon the question of vested rights under a long-continued construction of a statute by either courts or executive officers, showing that these rights cannot be divested or impaired.

Fourth. We also desire to submit authorities showing that the procedure under which the Monthly Official Railway List was excluded from the mails was illegal, unjust, arbitrary and oppressive, and therefore contrary to the spirit of the law which should govern courts and executive officers in the exercise of judicial functions.

10 This is not intended as an argument, but as a fuller presentation of the legal points which we desire to submit, and upon which we are prepared to submit many authorities.

Very respectfully submitted,

NEEDHAM & NEEDHAM,
Attorneys for Appellant.

That said legal counsel presented the communication aforesaid to the Postmaster General in person, and again requested that petitioner might have a hearing before the law department in case said matter was referred as requested, and that in the event said reference was not made or a hearing not granted before the law department, that said appeal should be set down for hearing before the Postmaster General; that after the submission of said communication last aforesaid there was no opportunity given to the petitioner or its legal counsel aforesaid to present to the Postmaster General or the law department connected therewith, any argument whatsoever, but, on the contrary, without argument or hearing, on or about February 14, 1902, the said Postmaster General decided said matter and

communicated said decision to the legal counsel of petitioner, which decision is in the words and figures following, to wit:

Office of the Postmaster General.

E. C. M.

WASHINGTON, D. C., *February* 14, 1902.

Messrs. Needham & Needham, attorneys and counselors, Bond building, Washington, D. C.

GENTLEMEN: Your favor of the 1st instant, setting forth more fully the grounds of your appeal from the action of the Third Assistant Postmaster General in excluding "The Official Monthly Railway List," published at Chicago, Ill., from the second class of mail matter, was duly transmitted to the Attorney General, who has returned the same without an expression of his views thereon.

I beg leave to further state that I have carefully considered all the evidence submitted to me relating to the appeal, together with the other evidence in the case, and am of the opinion that this publication does not possess the essential characteristics prescribed by the postal laws and regulations to entitle it to the specially privileged rates of postage, and, therefore, the action of the Third Assistant Postmaster General in withdrawing from it the privileges of mail matter of the second class is affirmed.

It is suggested that the questions involved in this case are now before the supreme court of the District of Columbia, in the mandamus proceedings instituted on behalf of the publishers of the

11 "Official Guide of the Railways and Steam Navigation Lines of the United States, Porto Rico, Canada, Mexico and Cuba."

Very respectfully,

H. C. PAYNE,

Postmaster General.

F. S.

And that in pursuance of said decision the postmaster at the city of Chicago has refused, and still refuses to receive and forward, said publication as second-class matter aforesaid, but requires a payment of postage thereon as third-class mail matter, which increases the cost of delivering said publication to the subscribers of your petitioner in a sum equal to about three hundred dollars per month; that said increase in postage will entail great financial loss upon your petitioner and unjustly and as petitioner is advised, unlawfully dispossess your petitioner of its said property and legal rights under said certificate without due process of law, and will greatly impair the value of its said business, and will operate to destroy its investment aforesaid made since and upon faith in said decision and certificate of February 5th, 1898, and your petitioner has outstanding contracts for the delivery of said publication periodically to subscribers and contracts with advertisers extending over one year from the 1st day of November 1901, which it must fulfill at great loss if said decision herein complained of is permitted to stand.

8. That by the postal laws and regulations in force in 1898, at the time said certificate was issued, and which are still in force, it is

among other things provided (section 284) that a certificate of entry like the one issued to your petitioner as aforesaid, may be revoked upon two grounds, first: where it appears that it was issued upon false evidence; and, second: where the character of the publication has been so changed since its admission as second-class matter as not to entitle it to the privileges of second-class matter. That it is not and has not been claimed or stated, or any evidence procured, by said executive department or any officers connected therewith, so far as your petitioner is advised, that there was any false evidence submitted to secure said certificate dated February 5, 1898, or that the same was fraudulently obtained by your petitioner, nor is it stated or claimed by said executive department or any of the officers connected therewith, as petitioner is advised, that the character of said publication has been changed in any particular since its admission as second-class matter on the said fifth day of February, 1898, so as to be no longer entitled to admission to the mails as second-class matter aforesaid. On the contrary, the petitioner alleges

12 the fact to be, that no false evidence was submitted at the time of the hearing in February 1898 aforesaid, and that the character of said publication has not been changed since the decision last mentioned; and that said decision by the Postmaster General of date February 14, 1902, was a review and attempt to reverse the said decision of February 5, 1898.

9. That by and under the laws of the United States above referred to, and the regulations of the said department in force as aforesaid, and the decision and certificate of February 5, 1898, aforesaid, and a uniform construction of said statute since it went into force, your petitioner secured and now possesses the legal right to have said publication admitted to the mails of the United States and transported and delivered to its subscribers as second-class matter at pound rates in accordance with the said certificate. That the right of your petitioner to have said publication entered and transported as second-class mail matter aforesaid having been judicially determined in February 1898, according to the law and the construction of the statute then prevailing, by and under the administration of Postmaster General Gary; and your petitioners, relying in good faith upon said decision, having invested and expended large sums of money, it is not and was not lawful for Postmaster General Smith or Postmaster General Payne to review, reverse and annul said decision by their predecessor except upon the grounds that said decision was obtained by false evidence or that the character of the publication had changed since the decision admitting it as second-class matter. That the acts and doings of the Third Assistant Postmaster General and said executive department in excluding said publication from the mails as and in the manner aforesaid, are contrary to the law and in violation of the legal rights of your petitioner. That the decision dated February 14, 1902, by the Postmaster General, was entered contrary to and in violation of proper judicial procedure in that petitioner was not granted a hearing upon said

13 appeal, and the said decision is an invasion of the legal rights of petitioner and operates to destroy property rights and privileges acquired by petitioner in the premises, without hearing or due process of law.

10. Your petitioner further alleges that the said decision by the Third Assistant Postmaster General, affirmed by the Postmaster General Payne, as aforesaid, was stated to be upon the ground that said publication possessed the characteristics of a book, and that the said act excluding said publication from the mails as second-class matter was not in any extent or to any degree based upon the ground that the said decision of February 5, 1898 was obtained by false evidence or that the said publication had been changed in any material characteristic since its admission to the mails as second-class matter aforesaid.

Your petitioner therefore prays that the writ of mandamus may issue to said Henry C. Payne, Postmaster General of the United States, commanding him to enter and admit the aforesaid publication known as "The Monthly Official Railway List" to the privileges of the second-class mail matter in accordance with said certificate dated February 5, 1898, and that the same be transported and delivered to its subscribers at the rates prescribed by law for mailable matter of the second class aforesaid; or that a rule on the said Henry C. Payne, Postmaster General, as aforesaid, may be granted to show cause why a mandamus should not be issued for the purposes aforesaid.

And your petitioner will ever pray.

[SEAL.]

THE RAILWAY LIST CO.,
By WILLARD A. SMITH, *Chairman.*

NEEDHAM AND NEEDHAM,
Attorneys for Petitioner.

14 DISTRICT OF COLUMBIA, ss:

Be it remembered that on this 26 day of February, 1902, before the subscriber a notary public in and for said District of Columbia, personally appeared Willard A. Smith, who, being first duly sworn, deposes and says: That he is now and for some time past has been chairman of the Railway List Company, the corporation by whom the foregoing petition is signed by affiant as its chairman under special authority given to him for that purpose; and that affiant has read said petition and knows its contents, and that the facts therein stated as of his own knowledge are true, and those stated upon information and belief he believes to be true.

WILLARD A. SMITH.

Subscriber and sworn to before me this 26 day of February, 1902.

[SEAL.]

L. M. FOX,
Notary Public.

15

Rule to Show Cause.

Filed Mar. 3, 1902.

In the Supreme Court of the District of Columbia.

THE UNITED STATES <i>ex Relatone</i> THE RAIL-	} At Law. No. 45264.
way List Company, a Corporation, Plain-	
tiff,	
<i>vs.</i>	
HENRY C. PAYNE, Postmaster General, De-	
fendant.	

Upon reading and considering the petition of the Railway List Company, filed in the above-entitled cause, it is ordered by the court this 3d day of March, 1902, that Henry C. Payne, Postmaster General, show cause on Friday the 7th day of March, 1902, at 10 o'clock a. m. why the writ of mandamus prayed for in said petition shall not be issued by the court requiring said Henry C. Payne, as Postmaster General, to enter and admit the publication described in said petition known as the Monthly Official Railway List, to the second class of mail matter and to the mails of the United States asailable matter of the second class to be transported as such, according to the prayer of said petition, provided a copy of this order be served upon the defendant on or before the 4th day of March, 1902.

A. C. BRADLEY, *Justice.**Marshal's Return.*

Served copy of within order on defendant.
M'ch 3rd, 1902.

AULICK PALMER, *Marshal.*
B.

16

Answer of Respondent.

Filed Mar. 26, 1902.

In the Supreme Court of the District of Columbia.

THE RAILWAY LIST COMPANY, Plaintiff,	} No. 45264. At Law.
<i>vs.</i>	
HENRY C. PAYNE, Postmaster General.	

For answer to the petition herein filed, the said Henry C. Payne, as Postmaster General, respectfully states as follows:

1 and 2. He has no knowledge of the accuracy of the allegations of the first and second paragraphs of said petition, and should the court deem the same material to a decision as to the issue of the mandamus herein prayed, he asks strict proof thereof.

3. Respondent has no personal knowledge of the allegations of the third paragraph of said petition, but is informed and believes that said publication is issued as stated in said paragraph, but he denies that it is published for the dissemination of information of a public character within the meaning of the terms of the act of Congress approved March 3, 1879, prescribing the conditions upon which periodicals may be admitted as second-class mail matter.

4. This respondent has no knowledge or information as to the allegations of the fourth paragraph of said petition, and if the court should deem the same material demands strict proof thereof.

5. This respondent has no knowledge of the allegations of the fifth paragraph of said petition, excepting in so far as the records of the Post-office Department show that on February 5, 1898, the monthly official list was determined by the then Third Assistant Postmaster General to be a publication entitled to admission into the mails at the rates fixed for second-class mail matter. He has no knowledge or information as to how duly and carefully the then

17 officials of the Post-office Department considered the facts concerning said publication, but does not deny that they performed their official duty in that respect, and that there was a full and fair hearing of the question. He denies that the said Post-office Department has been guilty of "unlawful acts and doings" in connection with said publication. He has no knowledge of the amount of money invested in the business of conducting said publication.

6. He admits that on or about the 4th day of October, 1901, the predecessor of this respondent notified petitioner that it would be given until October 18th in which to present evidence that said publication should not be excluded from the said second-class rates of postage, and that petitioner in response to said notice forwarded a written communication to the then Postmaster General as stated in said paragraph; that on the 18th day of November, 1901, petitioner received the notice and communication set forth in said paragraph, and that thereupon petitioner requested a rehearing, which said rehearing was granted, and that as a result thereof the Third Assistant Postmaster General refused to admit said publication longer to the United States mails as second-class matter.

7. Respondent admits that on the 12th day of December, 1901, petitioner appealed from the decision of the said Third Assistant to the Postmaster General; that pending said appeal and before the same was taken up for hearing the then Postmaster General resigned his position as Postmaster General and this respondent was duly appointed and confirmed as Postmaster General. This respondent further admits that the questions raised by said appeal were duly considered by him as Postmaster General and that the counsel for said petitioner submitted to this respondent the brief and argument set forth in said petition and dated February 1, 1902. He further avers that after a full consideration of the facts and the law relating to the publication of petitioner, this respondent on February 14, 1902, decided that the said publication of petitioner was not en-

titled to admission to the mails as second-class matter for the reason that it did not and does not possess the essential characteristics prescribed by law, and that said decision was communicated to
18 the counsel of petitioner by the letter set forth in said paragraph dated February 14, 1902.

Further answering said paragraph, respondent admits that in pursuance of said decision the postmaster at the city of Chicago has refused and still refuses to receive and forward said publication as second-class mail matter, which, respondent further admits, increases the cost of delivering said publication to petitioner. Respondent has no knowledge of the allegations in said paragraph that petitioner has outstanding contracts which it must fulfil at great loss, but avers that he is advised that the fact, if true, is immaterial to the issue presented by said petition. He denies that petitioner has been dispossessed of any property or legal rights without due process of law, but avers that, on the contrary, the petitioner had a full and fair hearing as to the merits of its contention in a matter which the law places within the jurisdiction of this respondent, and that after said hearing this respondent decided the question according to his best judgment as enlightened by the facts and the law presented to him.

8. This respondent admits that no false evidence was submitted to secure the admission of the publication of petitioner into the list of second-class mail matter, and that the character of said publication has not changed from the time of said admission, but he avers that in his judgment the said publication is not now entitled to be transmitted through the mails as second-class matter for the reason that it does not possess the statutory characteristics of such matter.

9. This respondent is advised that the matters and things stated in the ninth paragraph of said petition are conclusions of law and not fact, which this respondent is not required to answer. But as to the averment in said paragraph that the decision of this respondent dated February 14, 1902, was entered in violation of proper judicial procedure, in that petitioner was not granted a hearing upon said appeal, this respondent avers that while on appeal to this respondent no oral hearing was had, the merits of petitioner's
19 case were fully heard and considered; and that the printed argument presented by counsel for said petitioner was given due weight by this respondent in making his decision, and as conclusive proof that petitioner's claims were ably and forcibly presented by its learned counsel, this respondent refers to the aforesaid printed argument which is set forth in full in the said petition.

10. And for answer to the tenth paragraph of said petition, this respondent refers to his answers to the eighth and ninth paragraphs.

And having fully answered, respondent prays that the rule heretofore issued against him may be discharged, and that the petition be dismissed with costs.

HENRY C. PAYNE.

ASHLEY M. GOULD,
Attorney for Respondent.

I, Henry C. Payne, Postmaster General, on oath, say that I have read the foregoing answer by me subscribed and know the contents thereof; that the facts therein stated of personal knowledge are true, and that those stated upon information and belief I believe to be true.

HENRY C. PAYNE.

Subscribed and sworn to before me, a notary public in and for the District of Columbia aforesaid, this 22nd day of March, A. D. 1902.

THOS. E. ROACH,
Notary Public.

[SEAL]

[Endorsed:] R'y List. Answer.

20

Replication.

Filed Mar. 27, 1902.

In the Supreme Court of the District of Columbia.

THE UNITED STATES *ex Relatione* THE RAIL-
way List Company, a Corporation, Plain-
tiff,

vs.

HENRY C. PAYNE, Postmaster General, De-
fendant.

At Law. No. 45264.

For replication to respondent's answer to the petition herein filed, the Railway List Company respectfully states as follows:

1. Petitioner reaffirms the facts alleged in the first and second paragraphs of said petition.

2. Petitioner reaffirms the facts alleged in the third paragraph of said petition, and avers that, inasmuch as said periodical was determined by Postmaster General Gary to be published for the dissemination of information of a public character within the meaning of the terms of the act of Congress approved March 3, 1879, the substantive question was not reviewable by respondent, except on the grounds stated in section 284 of the Postal Laws and Regulations of 1893, namely, that said certificate had been obtained upon false evidence or that the character of the publication had been changed since the admission, and respondent's decision is therefore without authority and void.

21 3. Petitioner reaffirms the facts alleged in the fourth paragraph of said petition.

4. Petitioner reaffirms the facts alleged in the fifth paragraph of said petition, and insists that respondent has been guilty of "unlawful acts and doings" in that he reviewed and reversed the decision of the Postmaster General rendered February 5, 1898, without authority of law. The respondent admits in paragraph eight of said answer, that "no false evidence was submitted to secure the ad-

mission of the publication of the petitioner into the class of second-class mail matter and that the character of said publication has not changed since the time of said admission," therefore respondent's action in reviewing and reversing the decision of February 5, 1898, on grounds other than those provided by said regulation was not authorized by law and was consequently void.

6. Petitioner reaffirms the facts alleged in the sixth and seventh paragraphs of said petition, and avers that it has been dispossessed of property and legal rights without due process of law, as is shown by the facts alleged in said petition and the admissions contained in said answer.

7. Petitioner reaffirms the facts alleged in the eighth, ninth and tenth paragraphs of said petition, and avers that according to the facts alleged in said petition and admitted in said answer, respondent reviewed and reversed the decision of February 5, 1898, upon other grounds than that of fraud or that the character of said publication had changed since said decision, which action by said respondent was unlawful and void; that in deciding said appeal without a full hearing as requested, respondent deprived petitioner of its property and legal rights without due process of law.

22 8. Petitioner reaffirms all other facts alleged in said petition, and denies that the facts set up in said answer constitute a defence to or should deprive petitioner of the relief prayed for in said petition.

Petitioner therefore prays the judgment of the court, etc., and that the writ of mandamus issue as prayed, etc.

NEEDHAM & NEEDHAM,
Attorneys for Petitioner.

Stipulation.

Filed Mar. 27, 1902.

In the Supreme Court of the District of Columbia.

THE UNITED STATES <i>ex Relatione</i> THE RAIL- way List Company, Plaintiff,	} At Law. No. 45264.
<i>vs.</i>	
HENRY C. PAYNE, Postmaster General, De- fendant.	

It is hereby stipulated and agreed that the above-entitled cause shall be heard and determined by the court upon the facts set forth in the petition, answer and replication filed herein.

NEEDHAM & NEEDHAM,
Att'ys for Petitioner.

ASHLEY M. GOULD,
Att'y for Def't.

Order for Writ of Mandamus.

Filed May 7, 1902.

In the Supreme Court of the District of Columbia.

THE UNITED STATES <i>ex Relatione</i> THE RAIL-	} At Law. No. 45264.
way List Company, a Corporation, Plaintiff,	
<i>v.</i>	
HENRY C. PAYNE, Postmaster General, De-	}
fendant.	

This cause coming on to be heard upon the petition, the answer and return to the rule to show cause, the relator's replication thereto, and the agreed statement of facts, and being argued by counsel and considered by the court, and it appearing that the relator is entitled to the writ prayed for, it is hereby, this 7th day of May, A. D. 1902, by the court:—

Ordered, that the peremptory writ of mandamus do issue, commanding the respondent, the said Henry C. Payne as Postmaster General, to enter and admit the periodical known as "The Monthly Official Railway List," to the second-class mail and to admit the same into the United States mails asailable matter of the second class, to be transported at the pound rate of postage prescribed by law forailable matter of the second class as in said petition prayed;

And it is further ordered that the relator recover from the respondent, Henry C. Payne, the costs of this proceeding, to be taxed by the clerk.

And the respondent in open court, by direction of the Post-office Department, prays an appeal to the Court of Appeals.

A. C. BRADLEY, *Justice.*

[Endorsed:] R'y List Co. Order.

Mandamus.

In the Supreme Court of the District of Columbia.

THE UNITED STATES <i>ex Relatione</i> THE RAILWAY	} At Law. No.
List Company, a Corporation, Plaintiff,	
<i>vs.</i>	
HENRY C. PAYNE, Postmaster General, Defendant.)	45264.

The President of the United States to the respondent, Greeting:

Whereas, lately in the supreme court of the District of Columbia, the relator, by its counsel, filed its petition for the writ of mandamus, to be directed to said respondent, requiring and commanding him to enter and admit the periodical known as "The Monthly Official Railway List," to the second-class mail and to admit the same into the United States mails asailable matter of the second class, to be

transported at the pound rate of postage prescribed by law for mailable matter of the second class, as in said petition prayed ;

And said cause coming on to be heard by said court upon said petition, the answer and return to the rule to show cause, the relator's replication thereto, and the agreed statement of facts, was argued by counsel ;

On consideration whereof it was ordered and adjudged by said court on the 7th day of May, A. D. 1902, that the peremptory writ of mandamus issued to said respondent commanding him to
 25 enter and admit the periodical known as "The Monthly Official Railway List," to the second-class mail and to admit the same into the United States mails as mailable matter of the second class to be transported at the pound rate of postage prescribed by law for mailable matter of the second class, in accordance with the prayers of said petition :—

Therefore, you are hereby peremptorily commanded and enjoined, that immediately after the receipt of this writ, and without further delay, you do enter and admit the periodical known as "The Monthly Official Railway List," to the second-class mail and admit the same into the United States mails as mailable matter of the second class, to be transported at the pound rate of postage prescribed by law for mailable matter of the second class as prayed.

And this you are not to omit, and how you shall have obeyed and executed this writ, make known to the court within twenty days from the date hereof, by returning the same into the clerk's office properly endorsed.

Witness, the Hon. Edward F. Bingham, chief justice of said court, this 2d day of June, A. D. 1902.

[Seal of Court.]

JOHN R. YOUNG, *Clerk.*

Marshal's Return.

Served copy of within writ on respondent personally June 2, 1902.

AULICK PALMER, *Marshal.*
 B.

26 *Order Extending Time for Filing Transcript.*

Filed Jun- 3, 1902.

In the Supreme Court of the District of Columbia.

THE RAILWAY LIST COMPANY

vs.

HENRY C. PAYNE, Postmaster General.

} At Law. No. 45264.

Upon application of the defendant, by the United States attorney acting in that behalf, it is, this 3rd day of June, 1902, by the court, ordered that the time for filing the transcript of the record in this

cause upon the appeal of the defendant, in the Court of Appeals be, and the same is hereby extended until the first day of July, 1902.

HARRY M. CLABAUGH, *Justice.*

27 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, }
District of Columbia, } ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 26, inclusive, to be a true and correct transcript of the record, as prescribed by rule 5 of the Court of Appeals of the District of Columbia, in cause No. 45,264, at law, wherein The United States, *ex relatione* The Railway List Company, a corporation is relator, and Henry C. Payne, Postmaster General, is respondent, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 30 day of June, A. D. 1902.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1232. Henry C. Payne, Postmaster General, appellant, *vs.* The United States *ex relatione* The Railway List Company, a corporation. Court of Appeals, District of Columbia. Filed Jun- 30, 1902. Robert Willett, clerk.

